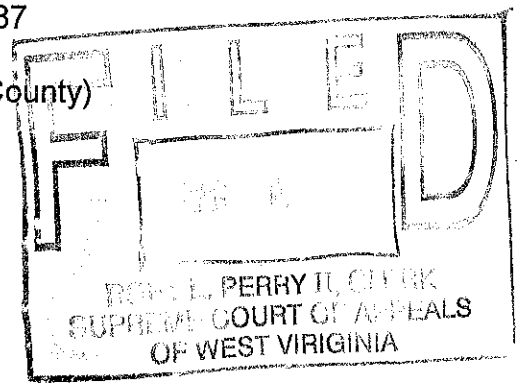
BEFORE THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

Supreme Court Docket No. 33287

Civil Action No. 05-C- 1066 (Cabell County)



DEBBIE PLUMLEY,

Appellee,

v.

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION,

Appellant.

APPELLEE'S BRIEF IN OPPOSITION TO APPEAL

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BEFORE THE WEST VIRGINIA SUPREME COURT OF APPEALS

DEBBIE PLUMLEY,

Petitioner/Appellee,

vs.

DOCKET NO.: 33297

WEST VIRGINIA DEPARTMENT OF HEALTH AND HUMAN RESOURCES/ OFFICE OF HEALTH FACILITY LICENSURE AND CERTIFICATION,

Respondent/Appellant.

Appeal from: Civil Action No.: 05-C-1066
(Circuit Court of Cabell County)

BRIEF OF APPELLEE IN OPPOSITION TO RESPONDENT'S PETITION FOR APPEAL

I. Statement of the Case

In1992 the Appellee, Debbie Plumley, took employment with Sallie Clark caring for residents at Mrs. Clark's assisted living facility on Mud River Road in Milton, West Virginia. Ms. Plumley worked at Mrs. Clark's facility until 1997. In 1997, Ms. Plumley took an elderly lady into her own home who had previously been a resident of Mrs. Clark's facility. Ms. Plumley, however, had no knowledge that she was required to register as a care giver.

In February, 1999, representatives of Department of Health and Human Resources/Office of Health Facility Licensure and Certification (OHFLAC -Appellant)

inspected Mrs. Clark's home and advised her she would have to reduce the number of residents from five (5) to three (3) unless she installed an appropriate sprinkler system. One of Mrs. Clark's residents located to another assisted living facility, and Ms. Plumley took into her home, a second of Mrs. Clark's residents and began caring for that resident.

In August, 1999, Ms. Plumley rented a larger house. When Ms. Plumley moved into her new home, she took in two (2) additional residents who had previously resided with Mrs. Clark. Later in 1999, Ms. Plumley took in an additional resident, and at one time had four (4) residents living with her in her home. Ms. Plumley has cared for five (5) different elderly residents since 1999.

In January, 2005, Rebecca Dunn and Kathy Beauchamp, representatives of "OHFLAC" , inspected Ms. Plumley's residence and gave her a list of discrepancies that required addressing before Ms. Plumley could continue to care for her residents. Ms. Dunn and Ms. Beauchamp subsequently discovered that Ms. Plumley's home was not a "legally un-licensed" facility and they advised her she would have to apply to the DHHR to become such a facility. As part of the application process, Ms. Plumley was required to submit a "fingerprint" card so that the "Criminal Investigation Bureau" (CIB) could investigate Ms. Plumley's background for a criminal record. During the CIB investigation, it was discovered that Ms. Plumley was convicted of Incest in 1987 and served five (5) years in prison for this conviction. Ms. Plumley was never required, however, to register with the State Registry of sexual offenders, nor is she listed on the State's "Central Abuse Registry."

In it's Statement of the Case, Appellant incorrectly stated that Ms. Plumley

worked in Mrs. Clark's assisted living home from 1992 through 1999, therefore, "Ms. Plumley knew or should have known of the existence and role of OHFLAC (Appellant) and its relationship to health care providers". Ms. Plumley actually worked for Mrs. Clark from 1992 to 1997. This discrepancy in dates, however, is irrelevant. What is relevant is that at no time during Ms. Plumley' tenure with Mrs. Clark, was Ms. Plumley required to submit a finger print card or to undergo any background investigation, as ostensibly required by Appellant's rules and regulations, even though, by Appellant's own admission, Mrs. Clark's facility "was subject to annual inspections and complaint investigations by OHFLAC surveyors." Therefore, it is completely plausible that Ms. Plumley knew nothing of the existence of the role of OHFLAC and its relationship to health care providers. When Mrs. Beauchamp and Mrs. Dunn advised Ms. Plumley of the licensure requirements, she immediately submitted the proper application and submitted to a criminal background check as required.

The Appellant also alleges in its statement of the case that Ms. Plumley was convicted, in 1992, of felony forgery and uttering and was sentenced to 1-5 years in the penitentiary. This conviction is irrelevant, however, as it does not disqualify Ms. Plumley from operating a legally unlicensed care home pursuant to Appellant's rules and regulations. Appellant acknowledges in its brief that this conviction was not a basis for its decision to force the closure of Ms. Plumley's facility. Appellee argues that this conviction was revealed in Appellant's statement of the facts for the sole purpose of inflaming this tribunal and further impugning Appellee's character. No where in Appellant's brief, however, does it mention Ms. Plumley's pristine record since she paid her debt for those mistakes fifteen (15) years ago.

By Order entered the 12th day of April, 2005, by the Secretary of the Department of Health and Human Resources, Ms. Plumley was notified that she was ineligible to operate a legally un-licensed home and was further Ordered to close her facility. Ms. Plumley requested and was afforded a hearing in this matter and the ALJ affirmed the Order Secretary of the Department of Health and Human Resources mandating the closure of her home.

The Appellee filed a Petition in the Circuit Court of Cabell County asking the Court to set aside the Secretary's Order mandating closure of Appellee's legally un-licensed care home. Following review of the record in this matter and after hearing arguments of counsel, Judge David Pancake entered an Order granting the relief sought by Appellee.

II. Argument

Response to Appellant's Assignment of Errors

A. The Circuit Court erred in its interpretation of 64 CSR§ 50 as well as in its decision that minors were not a dependent population

Appellant's sole basis for its decision to force closure of Appellee's care home as well as the basis for this appeal is the construction of its Legislature Rule *64 CSR § 50.4.4*

64 CSR § 50.4.4 states:

> ...In an unlicensed home administered by A service provider, the service provider, household members, exclusive of residents, and all care givers shall have a personal history which is free of: evidence of abuse, neglect, fraud, or substantial and repeated violations of applicable laws and rules in the operation of any health or social care facility or service organization, or in the care of dependent persons; and convictions of crimes relevant for the provision of care to a dependent population as evidence by a background check of the WV state police central abuse registry....

Appellant contends that the Circuit Court erred in determining that Appellee's child was not contemplated as a member of a "dependent population" which Appellant's rules were designed to protect. It is ludicrous to imply that the Circuit Court is not sensitive to the need for protecting children or that children are not a dependent population. The Court simply concluded that the term "dependent population" as stated in *64 CSR§ 50 4.4* did not contemplate that population.

Appellant concedes that the "State of West Virginia does not define dependent population, nor could a specific definition be located in a review of case law and statutes from across the country." Appellant instead cited as authority, a generic and broad definition of "dependent" from Webster's II New College Dictionary. Appellee argues that the Circuit Court properly construed the meaning of the term "dependent population" within Appellant's rules governing this matter.

B. The Circuit Court erred when it concluded that the West Virginia's Central Abuse Registry and the Sex Offender's Registry were the same entity.

Appellant argues that the Circuit Court erred in concluding that the Central Abuse Registry and the Sex Offender's registry were one in the same. While Appellee concedes that those two registries are defined in separate code sections, the Circuit Court determined that the scope of the Sex Offender Registry was included within the scope of the Central Abuse Registry. The Appellee concedes that the colloquy between Appellant's counsel and the Circuit Court regarding the distinction between the Central Abuse Registry and the Sex Offender's Registry was somewhat cryptic. Again, however, this distinction is irrelevant. *64 CSR §50 4.4* specifically states that a prospective care giver shall be free from "conviction of crimes relevant to the care of dependent persons as evidence by a background check of the WV state police central abuse registry." Ms. Plumley is not now, nor has she ever been listed on the State Police Central Abuse Registry nor Sex Offender's Registry. Ms. Plumley's employment with Sallie Clark's assisted living home was certainly no secret. By the Appellant's own admission, Mrs. Clark's home "was subject to annual inspections and complaint investigations by OHFLAC surveyors", yet Ms. Plumley was never required to submit to any form of background investigation. Ms. Plumley, in the 19 years since her conviction for incest, has never been required, informed, or notified by any person or agency, that she must register as a sex offender nor has she been listed on the State Police Central Abuse Registry.

The issue of whether Mrs. Plumley must now, nineteen (19) years after her conviction for a sexual related offense, register with the Sexual Offender Registry, is an issue yet to be determined. The fact remains that the Appellant's Rules, over which they have complete control and upon which they solely rely, do not disqualify Appellee from operating a legally unlicensed care home under the Rule's strict construction.

C. The Circuit Court erred when it ruled that the Secretary's Final Administrative Order violated Mrs. Plumley's constitutional rights, was an abuse of discretion, and in excess of the agency's authority.

The Appellant correctly sets out the Circuit Court's standard for review of administrative decisions. The Appellant argues that the Circuit Court erred in finding that the Appellant's Order closing Appellees care home was an abuse of discretion and in excess of the agency's authority. In support of this, Appellant cites *Walker v. W.Va. Ethics Comm'n* 201 W.Va. 108, 492 S.E.2nd 167 (1997). The substantive issue of Walker was whether a state employee had falsified travel expense forms. The Court in Walker reiterated the Standard of Review of Administrative Agencies. Pursuant to the Administrative Procedures Act:

> ...upon appeal to the appropriate circuit court, the court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse vacate or modify the decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> 1. In violation of constitutional or statutory provisions; or
>
> 2. In excess of the statutory authority or jurisdiction of the agency; or

3. Made upon unlawful procedures;

4. Affect by other error of law, or

5. Clearly wrong in view of the reliable, probative and Substantial evidence on the whole record, or:

6. Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion. *W. Va. Code* § 29 A-5-4(a):

The Appellant quoted certain legal principals cited in *Walker*, namely, " that evidentiary findings made at an administrative hearing should not be reversed unless clearly wrong; that the Court must evaluate the records of an agency's proceedings to determine whether there is evidence on the record to support the agency's decision; and that the task of the Circuit Court is to determine whether the (agency) decision was based on a consideration of the relevant factors and whether there was a clear error in Judgment..." The Appellant neglected to cite the remainder of the Court's conclusion in that paragraph, however. The Court went on to say that these "deferential standards have no application if the agency's decision is based upon a mistaken impression of the legal principals involved. Under such circumstances, the findings and conclusions of an agency will be accorded diminished respect on appeal.". *Walker* at 116.

Appellant also argues that the Circuit Court made the following rulings based on facts not in evidence:

> ...that the Administrative ruling deprived Appellee of property rights, specifically, the pursuit of life, liberty and the pursuit of happiness. That includes the right to earn a living and not be prohibited by the indiscretions of a number of years gone by which would have, in essence, substantially reduce or take away the right to earn a living- or livelihood, and the only way that Mrs. Plumley had been able to learn to live and earn a livelihood."
> (Tr. page 25).

The Appellant argues that the deprivation of property rights was not asserted below. The Appellee's livelihood, however, together with society's need to care for the elderly, is the very essence of this controversy.

Assuming for the sake of argument that Appellee did not assert property rights, the gravamen of the Court's ruling lies in the strict construction of the Appellant's own rules:

> .. The Court finds it is clearly an unwarranted exercise of discretion under the last phrase of that regulation for the department to find that a "dependent population" relates to elderly persons.
>
> In addition, the past record relative to incest was not found on a "background check of the West Virginia Central Abuse Registry". It does not comport with *(W Va. Code)*15-2C -2 which defines the central abuse registry, and it certainly requires more than a Criminal Investigation Bureau check. This is not a registry....(Tr. page 26)

The Appellant also implied that the Circuit Court "ruled" that Mrs. Plumley "did not commit incest." This assertion, taken out of context by Appellant, was not a ruling, but a recitation of the facts already in evidence. Mrs. Plumley testified in the administrative proceeding that she did not have sexual contact with her child, but that she had been drinking and permitted her husband to have contact with her daughter while the three were in the same bed. The Circuit Court stated that "she gets drunk, she doesn't commit the incest, she permits it to happen." (Tr. Page 21.)

While it is true that the Circuit Court opined that "providing health care services was the only way Ms. Plumley was able to learn and earn a livelihood" and "Ms. Plumley committed this criminal act during a "period of turmoil" (Tr. Page 25), this was not the basis for the Circuit Court's decision. The specific findings of the Circuit Court and the basis for its decision was that it was a clearly unwarranted exercise of

discretion under the last phrase of that regulation for the department to find that "a dependent person" relates to her elderly patients"; that the "past record relative to incest was not found on a background check of the West Virginia State Police Central Abuse Registry; that the decision by the Judge was– served as a prejudice to Ms. Plumley's substantial rights, including that to earn a living, and was an unwarranted exercise of discretion under 29A-5-4(g)(6).

The Circuit Court was in no way substituting its Judgment for the judgment of the Administrative Law Judge based on uncontested facts, but rather found that the Administrative Law Judge's decision was an unwarranted exercise of discretion based upon mistaken impression of the legal principals involved.

III. Conclusion

The Appellee argued equitable principals of laches and estoppel in its Petition for review to Circuit Court. These issues, however, were not raised in Appellant's brief. This year will mark the 20th since Ms. Plumley's felony conviction. She has never been required to register as a sex offender or listed on any abuse registries. There is nothing in any record of these proceedings to indicate that Ms. Plumley is a current threat to the safety and well-being of the ladies who have been in her care for years, or that the Ms. Plumley who committed this unfortunate offense twenty (20) years ago, is the same Ms. Plumley who is the subject of these proceedings today.

The Appellant argues that if Ms. Plumley is allowed to continue as a care giver, it will "open floodgates" or create "slippery slopes" in litigation. Although Appellee believes that equitable arguments are compelling in this matter, it is the legal principals involved that Appellee believes should be dispositive of this matter, and Appellee should not be deprived of a fair, equitable, and legal disposition of this matter because it may "open floodgates."

Appellee believes, as did the Circuit Court, that strict construction of CSR *64 §50 4.4* does not disqualify her from operating a legally unlicensed care facility

IV. Prayer

Wherefore, Appellant prays that this Court enter an Order sustaining the Ruling of the Circuit Court of Cabell County, and for such other, further and general relief as to this Honorable Court seems just and proper.

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By Counsel

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CERTIFICATE OF SERVICE

I, Victor Navy, do certify that I have served the foregoing APPELLEE'S BRIEF IN OPPOSITION TO APPEAL, by depositing a true and exact copy in the United State's Mail, certified, return receipt requested, addressed to the following:

Alice Warner Shumlas, Esquire
350 Capitol Street, Room 206
Charleston, WV 25301

Done this 26th day of March, 2007

Victor Navy